IN THE SUPREME COURT OF MISSISSIPPI

NO. 2016-IA-00442-SCT

PHILIP A. GUNN, SPEAKER OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES — **APPELLANT**

v.

REPRESENTATIVE J.P. HUGHES, JR. — **APPELLEE**

On Interlocutory Appeal
From the Circuit Court of Hinds County, Mississippi
First Judicial District

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT SCHEDULED FOR JULY 19, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional provisions:

Rules:

Other:

STATEMENT OF THE CASE

A plaintiff goes to the Supreme Court with the record he made, not the record he wishes he had made. Because Representative Hughes presented his case to the Circuit Court for the First Judicial District of Hinds County without giving notice to Speaker Philip Gunn, he enjoyed an unhindered opportunity to present any evidence and arguments he thought relevant in support of his petition. The responsibility for the failure of this record to support the temporary restraining order issued by the Court on May 23, 2016, R. 8, R.E. 7, rests solely on the shoulders of Representative Hughes.

Representative Hughes's brief before this Court rests entirely on factual assertions that appear nowhere in the petition he filed or the record he made. He claims that "Speaker Gunn retaliated" against Members who asked for bills to be read. Brief at 3. He decries "the heavy handed tactics used by Speaker Gunn in ramming through legislation without allowing time for adequate consideration or debate." Brief at 4 n.1. He complains that "this Court has no information regarding the facts and circumstances that occurred on and off of the House floor during the 2016 legislative session and prompted Speaker Gunn to retaliate against certain Members." Brief at 14-15. Finally, although he admits "that all the members of the Mississippi House of Representatives are literate," he asserts that "many of them admittedly had problems fully ascertaining the scope of bills passed in the 2016 legislative session." Brief at 18. Had this Court permitted the Circuit Court to conduct a hearing on the petition on March 28, 2016, none of this supposed evidence would have been admitted, because none of it was alleged in the petition. None of these unsupported assertions can now be considered by this Court in support of the temporary restraining order, which Representatives Hughes no longer attempts to defend.

The factual record before this Court consists of two documents. The first is a sworn petition filed by Representative Hughes. R. 3, R.E. 3. Of course, his oath does nothing to support the legal conclusions contained in the petition, but Speaker Gunn has not asked this Court to disregard the petition's sworn statements of fact. Instead, he has asked this Court to conclude that, even if true, the petition entitles Representative Hughes to no relief.

The second half of the factual record is the sworn affidavit of Andrew Ketchings, Clerk of the House, R. 16, R.E. 15, attached to Speaker Gunn's motion to dissolve. R. 10, R.E. 9. As this Court knows, affidavits constitute competent evidence in support of motions under M.R.C.P. 43(e).[1] Mr. Ketchings swore, on his own "personal knowledge of the facts," R. 16, R.E. 15, that each Member of the House has been provided the means of electronic access to the current status of bills at all times, as well as access to hard copies. R. 16-17, R.E. 15-16. Importantly, he reported that the House calendar contained 96 pending bills on which the House Rules provided that work must be completed by March 30, 2016. R. 17, R.E. 16.[2]

Although properly served with the Speaker's motion and the Clerk's affidavit, Representative Hughes neither responded to the motion nor objected to the consideration of the affidavit. In the response he filed with this Court on March 24, 2016, to Speaker Gunn's petition

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[1] Representative Hughes asserts that this Court cannot take judicial notice of disputed facts, Brief at 17 n.9, but Speaker Gunn has not asked this Court to take judicial notice of anything. He relies entirely on sworn evidence in the record.

[2] Representative Hughes complains, without explanation or citation to authority, that the Clerk's affidavit is "garden variety hearsay" that "would be inadmissible at any hearing." Brief at 3 n.1. Although "most, if not all, affidavits are hearsay," *Stewart v. Southeast Foods, Inc.*, 688 So. 2d 733, 734 (Miss. 1996), Rule 43(e) explicitly declares such affidavits to be admissible for consideration of motions. Affidavits may be considered "as long as they are based on personal knowledge and set forth facts such as would be admissible in evidence." *Levens v. Campbell*, 733 So. 2d 753, 758 (Miss. 1999). Although "portions of affidavits that contain inadmissable testimony or allegations that are not based on personal knowledge must be struck," *Trustmark Nat'l Bank v. Meador*, 81 So. 3d 1112, 1117 (Miss. 2012), Mr. Ketchings swore that he based the entirety of his affidavit on personal knowledge.

for interlocutory appeal, Representative Hughes did not ask for a hearing or an opportunity to present further evidence. Indeed, he said in ¶ 2 of his response, "What is at issue here is the meaning of the word 'read' in the Mississippi Constitution." On May 6, 2016, Representative Hughes filed with this Court his motion to lift stay and to remand to state court for further proceedings. Nothing in that motion suggested any further evidence to be presented to the Circuit Court concerning the original petition or the Clerk's affidavit. He asked in ¶ 9 for the opportunity to present an amended petition with unspecified allegations to be supported by undisclosed evidence.[3]

Neither due process nor any principle of law entitles any plaintiff to a hearing to present evidence on allegations he never made. The only business remaining before the Circuit Court is the award of damages to Speaker Gunn under M.R.C.P. 65(c) for his successful effort to secure the dissolution of the temporary restraining order. This Court should order the entry of judgment in Speaker Gunn's favor on the petition that Representative Hughes actually filed and remand the matter to Circuit Court for the computation of an award of damages.

ARGUMENT

I. NO CASE SUPPORTS JUDICIAL INTERVENTION INTO THE INTERNAL PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES.

A. Whether or not *Hunt v. Wright* is a jurisdictional case, all Mississippi cases defer to the House's power over its own proceedings.

Although Representative Hughes consistently confuses dicta and holding, he cannot obscure the fact that this Court for over a century has declined invitations to interfere in the internal proceedings of the Legislature. He presents no good reason why this case should be the first.

[3] In ¶ 10 he asked in the alternative for leave to file a recording with this Court. This Court denied all relief by its order of June 2, 2016.

Representative Hughes acknowledges, as he must, the controlling language which has guided this Court since before the adoption of the Constitution of 1890. "[T]he [L]egislature is 'not subject to supervision and revision by the courts as to those rules of procedure prescribed by the constitution for its observance . . . .'" Brief at 8, quoting *Hunt v. Wright*, 70 Miss. 298, 11 So. 608, 609 (1892), citing *Ex parte Wren*, 63 Miss. 512, 534 (1886). In both *Wren* and *Hunt*, a litigant asked this Court to declare a statute signed by the Governor to be invalid because of the supposed failure of the Legislature to follow mandatory constitutional provisions. *Hunt*, 11 So. at 609-10; *Wren*, 63 Miss. at 527-28. In both cases, this Court declined relief. "While the provision of [Miss. Const. art. 4, §] 68 [(1890),] is obligatory on the legislature, it is beyond the reach of the courts . . . ." *Hunt*, 11 So. at 610. "Every other view *subordinates* the legislature and disregards that co-equal position in our system of the three departments of government." *Wren*, 63 Miss. at 532 (emphasis in original). Because this reasoning supports the result reached by this Court, this reasoning constitutes a holding of these cases. *Menken v. Frank*, 58 Miss. 283, 285-86 (1880) (a statement constitutes a holding when "necessary to express the opinion of the court on the rights of the parties").

Representative Hughes grossly mischaracterizes that holding, declaring that "while it is true that the Court in *Hunt* refused to exercise its power to review legislative actions, it did not find that it was powerless to do so." Brief at 9. When this Court at the outset of *Hunt* adopted the holding of *Wren* that the Legislature "is not subject to supervision and revision by the courts as to those rules of procedure prescribed by the constitution," 11 So. at 609, it was announcing a lack of power, not a refusal to use existing power. The remainder of the *Hunt* opinion applied the *Wren* holding by examining which constitutional provisions are true rules of procedure and which are rules of substance. Representative Hughes does not bother to argue that Miss. Const. art. 4, § 59

(1890), on which he relies here, is anything other than a rule of procedure. Because § 59 is indisputably a rule of procedure, *Hunt* and *Wren* hold that it cannot be enforced by this Court.[4]

Representative Hughes merely complains that the holding of *Hunt* and *Wren* is old, and that the law "has evolved over time." Brief at 8. When it comes to constitutional interpretation, however, old opinions are the best opinions. He nowhere questions this Court's declaration that contemporary interpretations of the Constitution of 1890 are entitled to great weight. *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1340 (Miss. 1983) ("[T]he intention of the draftsmen was undoubtedly more firmly implanted in the memory of legislators at that time than at present."). Although he relies heavily on *Dye v. State ex rel. Hale*, 507 So. 2d 332 (Miss. 1987), he does not even pretend that *Dye* overruled *Hunt* or *Wren*. He completely ignores this Court's subsequent recognition that *Hunt* and *Wren* declared that the procedural rules of the Constitution "should be left to the Legislature to apply and interpret, without judicial review." *Tuck v. Blackmon*, 798 So. 2d 402, 407 (Miss. 2001). This Court in *Tuck*, then, clearly restated the holding of *Hunt* and *Wren* and recognized its continuing validity today.

Representative Hughes completely misrepresents *Tuck* in claiming that "the court held that if a legislative body exercises its responsibilities in a 'manifestly wrong manner that does critical harm to the legislative process' judicial intervention is justified." Brief at 11, quoting *Tuck*, 798 So. 2d at 407. Because no intervention took place in *Tuck*, that statement cannot possibly constitute the holding of the case. *See Smith v. Normand Children Diversified Class Trust*, 122 So. 3d 1234, 1237 (Miss. App. 2013), quoting *McKibben v. City of Jackson*, 193 So. 2d 741, 745

[4] Representative Hughes argues that this Court's refusal to adjudicate Speaker Gunn's compliance with § 59 would empower him to violate other provisions of the Constitution. Brief at 9. To the contrary, this Court, in a proper case, would do exactly what it did in *Hunt*; it would examine those provisions to see whether they are true rules of procedure. No need exists to examine those provisions today. As this Court wisely stated in *Hunt*, "Sufficient unto the day is the evil thereof." 11 So. at 611, quoting Matt. 6:34 (KJV).

(Miss. 1967); *Simpson v. Poindexter*, 241 Miss. 854, 134 So. 2d 445, 446 (1961). That dictum simply recognized the possibility that a different case might arise in the future, but, as in *Hunt*, 11 So. at 611, it wisely left its resolution for another day.

This case presents no occasion to reconsider the scope of this Court's power, because, as demonstrated in Part II of Speaker Gunn's original brief, Representative Hughes has neither alleged nor proven that Speaker Gunn has done "critical harm to the legislative process" by acting in a "manifestly wrong manner," *Tuck*, 798 So. 2d at 407, in his application of § 59. All prior Mississippi cases therefore dictate that Representative Hughes can be entitled to no relief.[5]

B. Representative Hughes cites no case from any other State which would support intervention here.

Representative Hughes cites to cases from outside Mississippi as support for the unsurprising statement that other state supreme courts have held that "mandatory procedural requirements contained in state constitutions related to the final passage of bills ... must be followed." Brief at 14 n.5. Indeed, this Court has so held,[6] but that is not the issue presented here. Hughes seeks to have this Court determine, not whether the House is required to comply with § 59, but rather whether the manner in which Speaker Gunn has chosen to comply with that provision is constitutionally sufficient. But that is exactly the type of inquiry which this Court has always refused to consider. As stated in *Tuck*, "procedural provisions for the operation of the

[5] Representative Hughes wisely declines to rely on the cases discussed in Part I.B of Speaker Gunn's original brief. Those cases concern disputes between branches of the government, not, as here, disputes within a single branch.

[6] *Hunt*, 11 So. at 610 ("the provision of section 68 is obligatory on the legislature"); *Wren*, 63 Miss. at 534 (discussing the "sound view" of regarding "all of the provisions of the constitution as mandatory" and those addressed to the Legislature are "mandatory to that body"). *See also In re Hooker*, 87 So. 3d 401, 412 (Miss. 2012) ("As stated earlier, the issue before us is not whether the thirty-day-notice provision must be complied with—it must.").

Legislature—whether created by constitution, statute or rule adopted by the houses—should be left to the Legislature to apply and interpret, without judicial review." 798 So. 2d at 407.

The decisions cited by Representative Hughes address claims that an enacted statute is invalid because certain constitutional provisions were not followed by the respective legislatures in enacting the statutes, the same issue this Court addressed in *Wren*. Courts generally agree that legislatures must comply with constitutional requirements, but this Court noted in *Wren*, 63 Miss. at 528, that "[t]here is great diversity of opinion" as to their authority to review compliance with those requirements. The cases cited by Representative Hughes (spanning across 80 years) reflect that diversity. The *Wren* Court discussed three different views:

> One view is that the legislature can act only as authorized by the constitution, and that the journals must show affirmatively conformity to the requirements of the constitution in the progress of a bill through its several stages to become a law, or else that it is not a law, and is to be so declared and treated by the courts.
>
> Another is that mere silence of the journals as to those matters not required by the constitution to be entered on them will not invalidate a bill passed by both houses, but a presumption will be indulged in favor of the conformity to the constitution and the act will be upheld on that presumption; but if the constitution requires the entry on the journals of certain things, and they are not shown by the journals, or if the journals affirmatively show a failure to observe these provisions of the constitution which relate to the passing of bills, but are not required to be entered on the journals, the bill will not become a law.
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> A third view is that the enrolled act signed by the president of the senate and the speaker of the house of representatives and the governor is the sole expositor of its contents and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions.

Id., at 528-29. The Court in *Wren* adopted the third view as it "meets our unqualified approval, because it is the simplest, the surest to avoid errors and difficulties, in accord with the constitution, and supported by an array of authority and a cogency of argument that commands our fullest assent." *Id.*, at 532. Furthermore, "[e]very other view *subordinates* the legislature and disregards

that coequal position in our system of the three departments of government." *Id.* (emphasis in original).

Four of the cases cited by Representative Hughes followed the views rejected by this Court in *Wren*. *Cohn v. Kingley*, 49 P. 985, 989-90 (Idaho 1897), followed the first view, which the *Wren* Court noted "has but feeble support." 63 Miss. at 529. Indeed, in another of his cited cases, *Carlton v. Grimes*, 23 N.W.2d 883 (Iowa 1946), which, like *Wren*, adopted the third view, *id.*, at 903-04, the Court noted that "the Legislature of Idaho in 1899 had to reenact most of the laws passed from the time Idaho became a state because of" the *Cohn* decision, which was subsequently modified by the Idaho Court. *Carlton*, 23 N.W.2d at 951.

State ex rel. Kohlman v. Wagner, 153 N.W. 749, 750 (Minn. 1915), followed the second view, but noted that "the tendency of recent judicial opinion is against the rights of the courts to go back of the enrolled act to determine by extrinsic evidence whether the bill was regularly enacted into law." *Id.*

It is unclear whether the courts in the remaining two cases followed the first or second view, but both looked to the journals in deciding the validity of the statutes at issue. *Plumley v. Hale*, 594 P.2d 497, 498-99 (Alaska 1979); *Roane Iron Co. v. Francis*, 172 S.W. 816, 816 (Tenn. 1915). That is precisely what this Court rejected in *Wren*.

Thus, *Wren* firmly rejected the principles of the cases on which Representative Hughes relies. In any event, none of those cases went as far as he now asks this Court to go. There appears to be no case in which any court has issued an injunction telling a legislative officer how to conduct legislative business. Because such an order contradicts the principles of *Hunt*, *Wren*, and *Tuck*, this Court must order the dismissal of Representative Hughes's petition.

II. REPRESENTATIVE HUGHES CAN BE ENTITLED TO NO RELIEF ON HIS PETITION.

In the prayer of the petition he actually filed, Representative Hughes asked for two things: "a temporary restraining order" and something called "a permanent preliminary injunction," R. 5, R.E. 5, a creature heretofore unknown to the law. He has waived his claim to a TRO. Even if this Court were to adopt the dictum of *Tuck* as controlling law, his petition would entitle him to no further relief, whether preliminary or permanent.

A. Representative Hughes has waived any claim that a TRO was properly entered.

Speaker Gunn demonstrated in Part III.A of his original brief that the Circuit Court entered its TRO in violation of the plain terms of M.R.C.P. 65(b). Not a word of Representative Hughes's brief disputes this demonstration. He simply claims that "[t]he application of Rule 65(b) . . . is a moot exercise." Brief at 15. To the contrary, Rule 65(c) requires Representative Hughes to secure "the payment of such costs, damages, and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." In ¶ 14 of his motion to dissolve, Speaker Gunn asked for such an award, R. 14, R.E. 13, and the Circuit Court will be obliged to resolve that request after this Court lifts its stay.

Because Representative Hughes does not bother to deny that the issuance of the TRO violated Rule 65(b), it is now apparent that Speaker Gunn was "wrongfully enjoined or restrained," within the meaning of Rule 65(c). His failure to address Speaker Gunn's procedural arguments confesses the merits of those arguments. *Turner v. State*, 383 So. 2d 489, 491 (Miss. 1980) ("failure to respond is tantamount to confession of error"). Although Representative Hughes could have attempted to defend his TRO on appeal, his failure to do so entitles Speaker Gunn to an award of damages, costs, and fees.

B. The sworn allegations of Representative Hughes's petition entitle him to no relief.

Representative Hughes begins his brief by demanding an opportunity to present evidence to prove that Speaker Gunn employed § 59 in a "manifestly wrong manner which did critical harm to the legislative process." Brief at 1, quoting *Tuck*, 798 So. 2d at 407. As Speaker Gunn demonstrated in his original brief and in Part I.A of this brief, this dictum from *Tuck* does not state the controlling law. Just as importantly, it does not describe the allegations of Representative Hughes's petition. Assuming the truth of everything to which Representative Hughes swore in his petition, he fails to bring himself within the language of *Tuck*.

What Representative Hughes alleges, and all he alleges, is that the reading of bills "so quickly that no human ear nor mind can comprehend the words of the bills," R. 5, R.E. 5, violates § 59 of the Constitution. He does not allege that Speaker Gunn is "manifestly wrong" in his belief that reading bills at such a speed does not violate § 59. He alleges no facts which would constitute "critical harm to the legislative process." He does not claim that a single Member is ignorant of "the words of the bills," R. 5, R.E. 5, being presented for a vote. His allegations are insufficient on their face to meet the standard that he claims to have been set by *Tuck*.[7]

Representative Hughes bitterly complains that limiting him to the record he chose to make somehow denies him due process. He observes that this Court indicated that Lieutenant Governor Tuck should have been given a fuller opportunity to present her case. Brief at 12 n.4 citing *Tuck*,

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[7] Speaker Gunn rests his argument on the proposition that the petition fails to state a claim, not that the affidavit of the Clerk has conclusively disproven that claim. Nevertheless, it should not escape the Court's notice that the Clerk has sworn that every Member has access to the words of every bill at all times. As demonstrated in the Statement of the Case, Representative Hughes has never challenged the truth of the Clerk's sworn assertions. In his brief in this Court he admits that "all the members of the Mississippi House of Representatives are literate." Brief at 18. In the face of that admission, it is hard to imagine how, consistent with M.R.C.P. 11, he could file any petition alleging "critical harm to the legislative process." *Tuck*, 798 So. 2d at 407.

798 So. 2d at 410. Lieutenant Governor Tuck, of course, like Speaker Gunn, was the defendant, but Representative Hughes is the plaintiff. The Circuit Court gave Representative Hughes all the due process he requested; he bears sole responsibility for his failure to plead or prove a cause of action.

There is no basis for Representative Hughes's wild allegation that Speaker Gunn "would have this Court believe that this provision of the Mississippi Constitution of 1890 is simply outdated and he should be able to do whatever he wants." Brief at 18-19. Speaker Gunn demonstrated at page 26 of his original brief that the purpose of § 59 was to ensure the comprehension of bills by the Members of the House, particularly those Members who were unable to read. When, as now, all Members are literate, the provision of the written text of each bill satisfies that purpose, regardless of how quickly the words are read.[8] Should it ever be the case that some Members are unable to read the words of the bills, whether from physical handicap or from collapse of the computer system, this Court should presume that any Speaker would apply § 59 so as to provide the opportunity for comprehension. Speaker Gunn has provided that opportunity here. There being no claim of ignorance by Representative Hughes, his petition entitles him to no relief.

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[8] In *Carlton*, one of the cases on which Representative Hughes relies, the Supreme Court of Iowa explained:

> The purpose of any provisions for reading a bill is to inform the Legislature concerning the nature of the proposed enactment and to prevent hasty legislation. Since all bills are promptly printed and copies are given to each member, and a file thereof is kept on his desk, the matter of reading bills to each assembly has become of less importance and is not so much stressed in Constitutions or assembly rules.

23 N.W. 2d at 889.

CONCLUSION

For the reasons stated herein and in Speaker Gunn's original brief, this Court should order the Circuit Court to dismiss Representative Hughes's petition, after resolving Speaker Gunn's pending request for fees and expenses.

Respectfully submitted,

PHILIP A. GUNN, Appellant

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CERTIFICATE OF SERVICE

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THIS, the 28th day of June, 2016.

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